Supreme Court, U. S.
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No.———

IN THE

Supreme Court of the United States

October Term, 1980

BIOMETRIC AFFILIATED RESEARCH LABORATORIES, INC. and LIDIA VAZQUEZ,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Questions Presented

1. Whether an intent to defraud is an essential element of the crime of making a "false, fictitious, or fraudulent claim" against the United States or a department or agency thereof, as defined by 18 U.S.C., § 287, and whether it was error for the trial court to refuse to charge the jury in this case that an intent to defraud was an essential element of that crime.

2. Whether there was legally sufficient evidence to support the conviction of petitioners of the crimes of making "false, fictitious, or fraudulent" claims against the United States and of mail fraud, involving allegedly fraudulent overcharges made by petitioners in Medicaid cases for a greater number of certain microbiological laboratory tests, known as sensitivity tests, than they had actually performed, where:

(a) the only specific proof offered by the Government of such overcharges was with respect to but 59 tests out of thousands of tests performed in the corporate petitioner's laboratory, and those 59 tests were the only ones specified in the indictment and the overcharges involved therein aggregated only $188.80; and

(b) apart from certain equivocal, speculative evidence, the only proof purportedly showing that petitioners had acted knowingly, wilfully and with criminal intent in billing for, and securing payment of, such 59 overcharges, consisted of the indefinite, problematic testimony of an expert witness as to the alleged average percentages of sensitivity tests performed by clinical laboratories generally, for all kinds of patients, in accordance with certain currently recognized limitations, without any evidence to show (i) that the same average percentages also reflected the experience of such laboratories in the relatively small

percentage of microbiological tests performed for the special kinds of indigent patients treated in Medicaid cases, or (ii) that the same currently recognized limitations had also been generally followed at the time of the tests in question, some four to five years earlier.

3. Whether it was error for the trial court (a) to permit the Government to introduce highly prejudicial evidence of other transactions having no connection with the crimes charged against petitioners, purportedly as proof of motive but having no relevance or probative value with regard thereto, and (2) to receive such evidence without weighing its possible probative value against its potentially prejudicial impact, and without giving any limiting instruction to the jury.

Parties

In the United States Court of Appeals for the Second Circuit, the parties were: United States of America, plaintiff-appellee, and Biometric Affiliated Research Laboratories, Inc. and Lidia Vazquez, defendants-appellants.

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OCTOBER TERM, 1980

BIOMETRIC AFFILIATED RESEARCH LABORATORIES, Inc. and LIDIA VAZQUEZ,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners, Biometric Affiliated Research Laboratories, Inc. (hereinafter "Biometric") and Lidia Vazquez (hereinafter "Vazquez"), respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 21, 1980, which affirmed judgments of the United States District Court for the Southern District of New York, entered on April 21, 1980, convicting each petitioner, following a jury trial, on (a) 59 counts of an indictment charging them with having made false, fictitious and fraudulent claims against the United States or a department or agency thereof, in violation of 18 U.S.C., § 287 (hereinafter "false claims counts"), and (b) 16 counts charging them with mail fraud, in violation of 18 U.S.C., § 1341.

Opinions Below

The opinion of the Court of Appeals is not reported, but is printed in Appendix A, *infra*. The opinion rendered by the District Court on one of the issues here presented is likewise not reported and is printed in Appendix B, *infra*.

Jurisdiction

As noted, the judgment of the Court of Appeals was entered on August 21, 1980 (Appendix C, *infra*). By order signed by Mr. Justice Thurgood Marshall of this Court on October 7, 1980, the time of petitioners to file this petition for a writ of certiorari was extended to and including November 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

Statutory Provisions Involved

The statutory provisions here involved are 18 U.S.C. § 287, 18 U.S.C. §1341 and 31 U.S.C. § 231. Those provisions are set forth in Appendix D, *infra*.

Statement of the Case

Petitioner Biometric is engaged in business as a duly licensed clinical laboratory. A portion of its business has been devoted to performing clinical laboratory tests ordered by doctors treating Medicaid patients, for which it would bill the New York City Department of Social Services (hereinafter "City DOSS"). Petitioner Vazquez was employed by Biometric in its laboratory.

Pursuant to Federal statute, 50% of all monies paid by the City DOSS on Medicaid claims is ultimately reimbursed to the City by the United States Department of Health, Education and Welfare ("HEW") in any cases

where Medicaid services are provided to families with dependent children and to aged, blind or permanently and totally disabled individuals whose income and resources are insufficient to meet the cost of such services (5a-6a).*

The 59 false claims counts on which petitioners were convicted related to 59 certain microbiological or bacteriological tests performed by petitioner Biometric for which it had billed Medicaid. There were two types of tests involved. One was a culture test to determine whether a particular specimen contained micro-organisms which might be adversely affecting the particular patient's health, and to identify and grow any such micro-organisms which the specimen might contain (44a-45a). The other was a sensitivity test to determine which antibiotics, if any, would be effective to combat the micro-organisms produced by the culture, by testing the sensitivity of such micro-organisms to different antibiotics (45a-47a).

The 59 tests in question had been performed at petitioner Biometric's laboratory at various dates between December 1974 and April 1976 (12a-15a). Under the New York City Medicaid fee schedule then in effect, up to November 1976, the fee for a culture test alone, under the Code designation L004, was fixed at $4.80, and the fee for a combination of culture and sensitivity tests, under the Code designation L006, was fixed at $8 (T. 440; G. Ex. 106). The Government's proof showed that in every one of the 59 cases, the referring doctor had ordered both a culture and a sensitivity test and that Biometric in each

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*Unless otherwise specified, figures in parentheses followed by the letter "a" refer to the pages of the Joint Appendix in the Court of Appeals, a certified copy of which has been filed with this petition; figures preceded by the letter "T." refer to the pages of the transcript of the trial, which petitioners are requesting the Clerk of the Court of Appeals to certify to this Court; G. Ex. refers to a Government's exhibit and D. Ex. to a defendants' (petitioners') exhibit; and emphasis throughout this petition is supplied.

case billed Medicaid and was paid $8, the fee provided for a combination of culture and sensitivity tests, but that the report of the culture test in each such case stated that there was no growth or was otherwise negative, so that there was no basis for performing a sensitivity test (G. Ex. 105). The 59 counts were accordingly predicated on alleged overcharges of $3.20 each, totalling $188.80, and the 16 mail fraud counts were also based thereon. The billings for the culture tests were not challenged.

Apart from the evidence relating to the 59 tests, there was no other specific proof of any alleged overcharges on petitioners' part, and the 59 tests in question constituted an infinitesimally small fraction of the total tests performed by Biometric. According to one of the Government exhibits (G. Ex. 114), it was estimated that a total of 41,911 such tests, comprising either cultures alone or a combination of cultures and sensitivities, were billed by Biometric to Medicaid and paid for by Medicaid during the period from January 1974 to October 1976. On the other hand, Biometric's records showed that during approximately that same period, from January 1974 through December 1976, a total of 5,004,935 laboratory tests of all kinds were performed at Biometric, averaging 1,668,312 a year, 32,082 a week and 5,347 a day, based on a six day week (T. 847-8).

Microbiological or bacteriological testing, such as that here involved, constituted only 4% of Biometric's total testing (T. 858-61), and the percentage of bacteriological testing which was billed to and paid for by Medicaid constituted only between about 25% and 30% of Biometric's total bacteriological testing. The evidence thus showed that the total number of bacteriological tests performed by Biometric during the period from 1974 through 1976 amounted to 174,955 (D. Ex.'s D-1, D-2, D-3), and that the total number of such tests billed to and paid for by Medicaid during that same period amounted to 44,496 (G. Ex. 114).

As purported proof that the 59 overcharges were not mere isolated instances in the course of thousands of tests but, rather, reflected a pattern of deliberate overcharges by petitioners, the Government relied on certain statistical evidence showing that in over 90% of the bacteriological tests for which Biometric received payment from Medicaid during the period up to October 1976, Biometric billed and was paid for both culture and sensitivity tests, as ordered by the referring doctor, whereas it did so in a much smaller percentage of tests during the period after October 1976 (G. Ex.'s 113, 114), when there was a change in the applicable Medicaid regulations limiting the cases in which payment could be obtained for sensitivity tests (293a; G. Ex. 110).

The Government also relied on evidence showing that during the period up to October 1976, the practice followed by the billing clerks at Biometric was to fill out the invoices sent in by the referring doctor with the particular specimen by billing for both culture and sensitivity tests, if the invoice stated that the referring doctor was ordering both such tests, without checking to see whether the sensitivity test had actually been performed (T. 557, 579-80, 634-5, 644, 646-7, 649-56). On the other hand, the evidence showed that that practice also resulted in undercharges by Biometric for the work performed by it. Thus, the Medicaid regulations provided that the fee of $3.20 fixed for a sensitivity test included testing up to 10 antibiotic discs, and an additional fee of 30¢ per disc was allowed if more than 10 discs were used (G. Ex. 106). Biometric would on many occasions do sensitivity testing requiring the use of more than 10 discs, but it made no charge for the additional discs, because of its practice to bill for a single 10-disc sensitivity test, in accordance with the instructions of the referring doctor, without checking to see whether additional discs were required in the performance of the test (T. 865-9, 1034-5, 1039, 1042, 1047-9, 1052).

In addition, the Government relied on opinion testimony by an expert witness, Dr. Marion Wilson with respect to the alleged average clinical experience of laboratories throughout the City over the course of a year in bacteriological tests for all kinds of patients. Dr. Wilson, a microbiologist, was permitted, over objection by defense counsel, to give her estimate of the average percentage of culture tests performed by laboratories throughout New York City over the course of a year, that yielded results, which in her opinion, would warrant the performance of sensitivity tests (58a-74a). She estimated that average percentage on an "overall" basis, and after "disregarding all variables," as falling "in the range of 18 to 20% plus or minus perhaps another 5%" (75a).

Dr. Wilson admitted, however, that the estimated general average percentage to which she testified did not take account of a large number of variables to which that percentage was subject. She thus acknowledged that the percentage would vary depending on the particular patients involved, the particular referring doctor and the particular laboratory (72a), and that in a hospital laboratory the percentage would run as high as "40 to 60 per cent, depending on the service" (76a).

Dr. Wilson made no attempt to give any estimate of any city-wide average percentage with respect to tests performed on specimens from Medicaid patients such as those here involved, and there was a complete absence of evidence to show any alleged average clinical experience with respect to the results of such tests in Medicaid cases. Further, Dr. Wilson admitted that Medicaid cases might be in a special category in the respect that poor patients, such as those who use Medicaid, might go to doctors only when "there is something wrong with them and the likelihood of greater incidents is greater" (71a).

Moreover, the average general percentage to which Dr. Wilson testified was predicated on the assumption that a sensitivity test could properly be made by a laboratory only in certain limited circumstances, in accordance with what she stated was proper laboratory practice, apparently as of the date of her testimony in January 1980—some four to five years after the tests here involved. It was thus her opinion, on the basis of such laboratory practice as of January 1980, that a sensitivity test could be properly made only where a culture test showed pathogenic (i. e., disease-causing) micro-organisms or a urine culture showed a count of at least 10,000 colonies per milliliter of urine (T. 325, 331-2), and that no sensitivity test could properly be made in cases involving certain types of streptococcus found in throat cultures, such as alpha hemolytic streptococcus (hereinafter "alpha strep"), which she claimed should be considered as "normal flora" or non-pathogenic organisms (116a-118a).

On the other hand, Dr. Wilson acknowledged that she had previously admitted that "in general more sensitivity testing was done five years ago than is done today" (109a), and that "five years ago it was the practice to do sensitivity tests on more of the streptococcus that were isolated from throat cultures than is now considered wise to do" (110a). She further admitted that on occasion even the presence of "normal flora" could point to a troublesome health problem and a sensitivity test could be indicated (99a, 105a, 117a).

Actually, the limitations with respect to sensitivity tests which were at the basis of Dr. Wilson's testimony were not specifically formulated as part of any Medicaid regulations until November 1, 1976. Prior to that date, there were no Medicaid regulations limiting the types of sensitivity tests for which payment would be allowed, other than a generally worded regulation that payment would be

made only for "necessary . . . services" (290a; G. Ex. 109). It was not until November 1, 1976 that specific regulations were adopted limiting payment for sensitivity tests to tests "only for pathogenic organisms . . . and not for non-pathogenic organisms", and in the case of urine cultures, to sensitivities only where a count of more than 10,000 colonies per milliliter of urine was involved (293a; G. Ex. 110). The new regulations also required that a copy of the laboratory result of the culture test be attached to the invoice for the sensitivity test (G. Ex. 110).

The Government further relied on the testimony of several defense witnesses—Bernard Halpert, the principal of Biometric, and Dr. Jack Goldstein and Ms. Elaine Snobar, bacteriologists employed by Biometric—that the percentages of culture tests performed by Biometric which yielded results warranting sensitivity tests, though much higher than the overall general average percentage testified to by Dr. Wilson, were less than 100%. Such estimated percentages ranged between 66⅔% and 75%, as testified to by Halpert (T. 1116, 1118); between 62% and 73% during the period between September and December 1979, as testified to by Goldstein (T. 882-3); and at about 60% during the period after August 1, 1976, as testified to by Ms. Snobar (T. 925-6). However, all of these estimated percentages were based on the results of culture tests generally, as performed at Biometric, without any breakdown with respect to tests on specimens from Medicaid patients, and the percentages to which the said witnesses testified could manifestly not be regarded as the percentages reflecting Biometric's experience in Medicaid cases.

Over petitioners' objections (80a-81a, 160a, T. 667-8, 694, 713-14, 717), the Government was permitted to introduce evidence, on its direct case, with respect to certain transactions having no connection with the crimes charged herein, which involved petitioner Vazquez and an entity

known as Hispanic-American Health Foundation (hereinafter "Hispanic") which she had identified in Grand Jury testimony as her "personal business" (T. 736-7). Also involved in these transactions were several other entities of which petitioner Biometric or its principal, Halpert, was the only stockholder—namely, Biometric Chemical Laboratory, Inc. (hereinafter "Biometric Chemical"), a subsidiary of petitioner Biometric; Tender Care, Inc. (hereinafter "Tender Care"), of which Halpert was principal; and General Research Laboratory, Inc. (hereinafter "General Research"), a surgical supply company which was a subsidiary of Tender Care (T. 696-8, 707-8, 722).

The Government was thus permitted to introduce evidence that during the period between May and December 1970, checks of Biometric Chemical to Hispanic's order totaling $11,600 and representing funds of petitioner Biometric, were deposited in Hispanic's bank account (T. 698-9, 704, 724-8, 740-743). The Government was then permitted to show that a total of some $9,900 was withdrawn from Hispanic's bank account during the same period, of which some $4,500 was in the form of checks drawn to the order of General Research and the balance in the form of checks drawn to Vazquez or her children, or to cash, or to miscellaneous persons who apparently endorsed the checks over to Vazquez (T. 738-9, 744-51; G. Ex. 119). The Government was also permitted to introduce evidence that the checks drawn to the order of General Research were deposited in the latter's bank account by Vazquez; that in the case of a number of such deposits, Vazquez substituted those checks for cash receipts of General Research which would otherwise have been deposited in that account; and that in several of such instances Vazquez had "whited out" or crossed out the "cash" items on the deposit slips and substituted check items therefor (T. 712-722, 747-9).

All of the foregoing evidence was admitted by the trial court as showing a personal benefit received by petitioner Vazquez which might have provided a motive for her committing a fraud on Biometric's behalf (85a, 169a-170a, T. 667-8, 695, 714, 717), even though, as more fully shown below, the transactions involving General Research and the substitution of checks for that entity's cash receipts could not possibly have conferred any personal benefit on Vazquez.

The challenged evidence gave rise to a number of collateral issues which petitioners found it necessary to meet. Thus, petitioners introduced evidence that Hispanic had been organized to start a health foundation, with contributions from a group of Latin American doctors, but had then lain dormant, and that the aforementioned cash receipts of General Research were used to pay various drivers and suppliers of Biometric who wanted to be paid in cash, rather than by check, because Biometric was at that time "tight on money" (T. 1009-13, 1017-18, 1021-6).

In his summation, the Government prosecutor placed great emphasis on the foregoing evidence (T. 1429-33), and intimated that there was an ulterior motive served by the substitution of checks for General Research's cash receipts, describing what happened as a "launder[ing] [of] the money" (T. 1432).

Prior to submission of the case to the jury, petitioners' counsel requested the trial court to charge the jury that before they could convict petitioners of filing false claims under 18 U.S.C. § 287, they would have to find, among other elements, that petitioners had submitted such claims "with intent to defraud" (210a-214a). The court, however, refused so to charge, holding that since 18 U.S.C. § 287 used the words "false, fictitious, or fraudulent" in the disjunctive, a defendant could be convicted thereunder merely on proof that he had submitted a false claim, so long as it was shown that he knew that it

was false, regardless of whether he did or did not have any intent to defraud the Government (211a-214a).

Decision of Court of Appeals

The Court of Appeals affirmed the judgments of conviction in open court with an orally delivered opinion (App. A, *infra*). Even though the trial judge had submitted the case to the jury only on the issue whether petitioners had unlawfully billed Medicaid for tests that were not performed, as distinguished from billings for tests that were performed but were not "necessary" (252a, 254a, 260a), the Court of Appeals affirmed the judgments of conviction on the basis of the sufficiency of the evidence to permit the jury to find that petitioners had "acted knowledgeably, wilfully, deliberately and fraudulently *in performing tests that were unnecessary* and in billing for tests that were not performed at all" (App. A, *infra,* p. 2a).

As regards the trial judge's refusal to charge the jury that an intent to defraud was an essential element of the crime of filing a "false, fictitious or fraudulent claim", as defined by 18 U.S.C. §287, the Court of Appeals held that "the concept of intent to defraud" did not have to be specifically "articulated to a jury" and that it was sufficient for the trial judge to charge, as he did in this case (252a), that petitioners could be convicted if they had "acted intentionally, unlawfully and wilfully, knowing that the claim was false, fictitious or fraudulent" (App. A, *infra,* pp. 2a-3a).

As regards the irrelevant evidence which the trial judge permitted the Government to introduce on the issue of motive, the court rejected petitioners' objections to such evidence on the ground that it was not "unduly prejudicial" (App. A, *infra,* p. 2a).

Reasons for Granting the Writ.

1. As to whether an intent to defraud is an essential element of the crime of making a "false, fictitious, or fraudulent claim" against the United States or a department or agency thereof, as defined by 18 U.S.C. § 287.

The question here presented, not previously determined by this Court, is worthy of review because there is a direct conflict in various circuits between the interpretation accorded to the governing provisions of the *criminal* false claims statute, 18 U.S.C. § 287, and that accorded to the identically worded pertinent provisions of the *civil* false claims statute, 31 U.S.C. § 231.

Both the criminal statute and the pertinent provisions of the civil statute make liability thereunder depend on whether the defendant submitted the particular claim, "knowing such claim to be false, fictitious, or fraudulent" (see texts of 18 U.S.C. § 287 and 31 U.S.C. § 231, set out in Appendix D, *infra*). Indeed, the two statutes had a common origin in a statute enacted in 1863 (Act of March 2, 1863, c. 67, 12 Stat. 696), and when the latter statute was thereafter re-enacted in the form of separate criminal and civil provisions, the resulting civil section (Rev. Stat. § 3490) merely provided that the commission of any of the acts proscribed by the criminal section (Rev. Stat. § 5438), would subject the offender to civil liability to the United States. See *United States* v. *Bornstein*, 423 U.S. 303, 305-7, fn. 1 (1976); *United States* v. *Neifert-White Co.*, 390 U.S. 228, 229, fn. 1 (1968).

Yet, as shown below, a majority of the circuits have interpreted the pertinent provisions of the civil statute as requiring proof of a specific intent to defraud, whereas a contrary interpretation has been accorded to the criminal statute in two circuits. As noted, the Court of Appeals in the present case held that "the concept of intent to defraud" did not have to be "specifically articulated to a jury".

It has thus been held in a majority of the circuits that a prerequisite to establishing liability under the *civil* false claims statute, 31 U.S.C. § 231, is proof of a specific intent to defraud. E.g., *United States* v. *Mead,* 426 F.2d 118, 121 (9th Cir. 1970); *United States* v. *Ueber,* 299 F.2d 310, 314 (6th Cir. 1962); *United States* v. *Aerodex, Inc.,* 469 F.2d 1003, 1007 (5th Cir. 1972); *cf. United States* v. *Bausch & Lomb Optical Co.,* 131 F.2d 544, 546 (2d Cir. 1942), aff'd. by an equally divided court, 320 U.S. 711 (1943). However, there are decisions to the contrary in some other circuits. *United States* v. *Hughes,* 585 F.2d 284 (7th Cir. 1978); *United States* v. *Cooperative Grain and Supply Co.,* 476 F.2d 47 (8th Cir. 1973).

In support of the interpretation requiring proof of a specific intent to defraud on the part of the defendant in order to establish liability under 31 U.S.C. § 231, the Court of Appeals for the Ninth Ciruit pointed out in *United States* v. *Mead, supra,* 426 F.2d at 122-3, that "[i]ntent to defraud has always been an essential element of common law fraud and Congressional intent to partially dispense with that element in the False Claims Act is lacking." The court further stated that the "juxtaposition [in that Act] of the three adjectives, 'false, fictitious, or fraudulent' probably resulted from a draftsman's desire to encompass the varying ways in which fraud is defined" (426 F.2d at 122-3).

It is further significant, as noted by this Court in *United States* v. *Bornstein, supra,* 423 U.S. 303, 309, text and fn. 5 (1976), that section 231 "was originally aimed principally at stopping the massive *frauds* perpetrated by large contractors during the Civil War" and that "[a]ccording to its sponsor, the False Claims Act was adopted 'for the purpose of punishing and preventing * * * *frauds*' * * * *.*"

It is submitted that the interpretation applied by the foregoing courts to the pertinent provisions of the civil

statute, requiring proof of an intent to defraud, is equally applicable, *a fortiorari,* to the identically worded provisions of the criminal statute, 18 U.S.C. § 287. It would not make sense to hold that though the governing provisions with regard to the submission of a claim, "knowing such claim to be false, fictitious, or fraudulent", are identical in both the civil and the criminal statutes, the same words are interpretable as requiring proof of a specific intent to defraud only under the civil statute, and not under the criminal statute. Any such difference in interpretation would lead to the anomalous result that "the Government need prove fewer elements to put a man in jail than to recover civil penalties." See Gondelman, "False Claims Against the Government: Defense Tactics in a False Claims Prosecution", 17 American Criminal Law Review 399, 405 (1980).

There are two recent decisions which have held that an intent to defraud is not an essential element in a criminal prosecution for the making of a false claim under 18 U.S.C. § 287. *United States* v. *Maher,* 582 F.2d 842, 847-8 (4th Cir. 1978), cert. den., 439 U.S. 1115 (1979); *United States* v. *Milton,* 602 F.2d 231, 232-3 (9th Cir. 1979). However, there was no reasoned analysis in those cases of the considerations underlying the contrary interpretation of the identically worded provisions of the civil statute, discussed above, and no cogent reasons were given for not following that interpretation, beyond the tenuous conclusory statement that "the nature of the proceedings, the standards of proof, and the defendant's interests at stake are wholly different under these two statutes, and in construing § 287 we do not find either authority or persuasion in defendant's analogy to § 231." *United States* v. *Maher, supra,* 582 F.2d at 848; see also *United States* v. *Milton, supra,* 602 F.2d at 232-3.

Petitioners' position has been that they acted throughout in good faith and without any intent to

defraud, as confirmed by the fact, as noted above, that their practice of billing on the basis of the tests which the referring doctor had ordered, without checking the actual results of the tests, resulted in the *undercharging* of Medicaid by not charging for extra testing services performed by Biometric which the referring doctor had not specified in the original invoice. The issue of intent to defraud was therefore a crucial one. The Court of Appeals regarded it as sufficient that the trial judge had instructed the jury that before returning a verdict of guilty they would have to find that petitioners had "acted intentionally, unlawfully and wilfully, knowing that the claim was false, fictitious or fraudulent" (252a). The trial judge had, however, charged, in addition, that the element of guilty knowledge was "established" if petitioners were "aware of a high probability that the claims were false but chose to ignore that high probability" (254a).

The trial judge's refusal to charge the element of intent to defraud in connection with the false claims counts was highlighted by his inclusion of that element in his submission of the mail fraud counts to the jury. The Court of Appeals regarded the trial judge's charge as "well within the scope" of its earlier decision in *United States* v. *Precision Medical Laboratories, Inc.*, 593 F.2d 434 (2d Cir. 1978). However, a reading of the trial judge's charge in the latter case shows that the trial judge there treated the elements of both the false claims counts and the mail fraud counts as if they were substantially the same and clearly conveyed the impression to the jury that the elements of "wilfully, knowingly and unlawfully" meant the same thing as having a "specific intent to defraud", and that there was no difference in this respect between the false claims counts and the mail fraud counts. (see Appellants' Appendix in *United States* v. *Precision Medical Laboratories, Inc., supra,* pp. 30a-35a). Indeed, the Court of Appeals for the Ninth Circuit has interpreted the decision in *United States*

v. *Precision Medical Laboraties, Inc., supra,* "as tacitly approving instructions under 18 U.S.C., § 287 which required an intent to defraud." See *United States* v. *Milton, supra,* 602 F.2d 231, 234, fn. 8 (9th Cir. 1979).

It is immaterial that the trial judge here did charge that an intent to defraud was an essential element of the mail fraud counts and that petitioners were also found guilty on those counts. It is submitted that where, as here, there has been a failure to submit to the jury an essential element of the offense charged, the error is of such a fundamental nature (see *Screws* v. *United States,* 325 U.S. 91, 107 [1945]) that the defendant is entitled to a reversal regardless of whether there is any actual showing of prejudice. *Cf. United States* v. *Wabaunsee,* 528 F.2d 1, 4-5 (7th Cir. 1975); *United States* v. *Beard,* 414 F.2d 1014, 1015-16 (3d Cir. 1969).

2. As to the insufficiency of the evidence to support the conviction of petitioners.

The question here presented is whether a defendant in a Federal criminal case may properly be convicted of fraudulent conduct in relation to a particular class of cases, on the basis of evidence of the average general experience of others in all kinds of cases and as of a date years later than the commission of the defendant's alleged fraudulent acts, where there is no showing that such average general experience of others was the same at the earlier date or that it also reflected their experience in the particular class of cases on which the prosecution was predicated.

As noted above, the Government relied primarily on the testimony of its expert witness, Dr. Marion Wilson, as purportedly showing that the percentage of sensitivity tests for which petitioner Biometric billed, and was paid for by,

Medicaid, was so much greater than Dr. Wilson's estimated average city-wide percentage of sensitivity tests, that petitioners must necessarily have fraudulently substantially overstated the number of such sensitivity tests for which Biometric was entitled to be paid. However, the Government's reliance on Dr. Wilson's testimony was based on a number of unsubstantiated assumptions.

For one thing, Dr. Wilson made no attempt to give any estimate of any city-wide average percentages with respect to tests performed on specimens from Medicaid patients such as those involved in this prosecution. Indeed, there was a complete absence of evidence to show any alleged average clinical experience with respect to the results of such tests in Medicaid cases, or any basis for equating the average clinical experience in microbiological tests generally with the experience in tests performed only on specimens from Medicaid patients.

As shown above, the microbiological tests performed by Biometric in Medicaid cases constituted only a small fraction of its total microbiological testing. Thus, out of a total of 174,955 microbiological tests performed by it during the period from 1974 to 1976, the number of such tests performed in Medicaid cases amounted only to 44,496, or about 25.4% of the total (G. Ex. 114; D. Ex.'s D-1, D-2, D-3). It is submitted that it would be entirely speculative to assume that such a small percentage of microbiological tests performed by Biometric on specimens from Medicaid patients would yield the same results as any purported general average of the overall clinical experience of the many different laboratories in the City of New York, or, for that matter, any average shown by the microbiological tests performed as a whole by Biometric.

As also shown above, Dr. Wilson herself acknowledged that the percentages to which she testified would vary

depending on the particular patients involved, the particular referring doctor and the particular laboratory. She further admitted that Medicaid cases might be in a special category in the respect that poor patients, such as those who use Medicaid, might go to doctors only when "there is something wrong with them and the likelihood of greater incidents is greater" (71a).

That Medicaid cases are in a class by themselves has also been confirmed by a report of the United States Surgeon General indicating that the poor generally have greater health problems than others. The Solicitor General has thus reported that "For many reasons, the poor face more and different health risks than people in higher income groups * * *." See "Healthy People: The Surgeon General's Report on Health Promotion and Disease Prevention", United States Department of Health, Education and Welfare, Public Health Service, Publication No. 79-55071 (1979), p.14.

Furthermore, as shown above (at pp. 7, 8), Dr. Wilson's estimate of the city-wide average percentages of sensitivity tests was based on her judgment as to what was proper laboratory practice as of the date of her testimony in January 1980—some four to five years after the tests involved in this prosecution. Thus, in estimating such average percentages, Dr. Wilson took no account whatever of the earlier practice of laboratories such as Biometric to perform sensitivity tests in cases involving streptococci like alpha strep or urine cultures showing counts of less than 10,000 colonies, during the period prior to November 1, 1976, when specific Medicaid regulations were first adopted excluding any allowance for sensitivity tests in such cases.

Dr. Wilson had, indeed, herself previously admitted that "in general more sensitivity testing was done five years ago than is done today", and that "five years ago it

was the practice to do sensitivity tests on more of the streptococci that were isolated from throat cultures than is now considered wise to do" (109a, 110a). Dr. Wilson's testimony thus amounted to a retroactive application of subsequently adopted standards to the tests here involved which had been performed during the period prior thereto.

There was certainly no basis or warrant for charging petitioners with criminal conduct by reason of Biometric's having billed Medicaid for sensitivity tests actually performed by it, in accordance with orders from referring doctors, during the period prior to November 1, 1976, in cases involving streptococci such as alpha strep or urine cultures showing counts of less than 10,000 colonies, with respect to which specific restrictions were first adopted subsequent to that period. As noted, the only pertinent limitation under the Medicaid regulations in effect prior to November 1, 1976 was that billing was allowable solely for "necessary" sensitivity tests, and there was at least ample room for an honest difference of opinion as to whether a sensitivity test could be regarded as "necessary" under those earlier regulations in cases involving such streptococci as alpha strep. As a matter of fact, though Dr. Wilson described alpha strep as "normal flora", she acknowledged that on occasion even normal flora could point to a troublesome health problem and a sensitivity test could be indicated (99a, 105a, 117a). Further, one of petitioners' witnesses, Ms. Elaine Snobar, a microbiologist, gave uncontradicted testimony that alpha strep could be the primary cause of an often fatal disease known as subacute bacterial endocarditis (T. 937-8).

It is submitted that insofar as the charges against petitioners were based on the claim that they violated the pre-November 1976 Medicaid regulations limiting billings for laboratory tests to those which were "necessary", the latter standard was so vague and indefinite as to be void under the due process clauses of the Fifth and Fourteenth

Amendments to the United States Constitution. *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939); *United States* v. *Laub*, 385 U.S. 475, 487 (1967); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972).

The Court of Appeals in this case held that the jury had "an abundant basis to conclude" that petitioners had acted fraudulently both "in performing tests that were unnecessary and in billing for tests that were not performed at all" (*infra*, p. 2a). The fact is, however, that the question whether petitioners had acted fraudulently in billing for "unnecessary" tests performed by them was never submitted to the jury. The trial court thus instructed the jury to focus solely on the question whether petitioners had billed for sensitivity tests which had not been performed, both as regards the false claims counts and the element of intent to defraud in connection with the mail fraud counts (252a, 254a, 260a).

The other proof on which the Government relied was either speculative or equivocal or subject to the same deficiencies as Dr. Wilson's testimony. Thus, as regards the testimony of the defense witnesses, Bernard Halpert, Dr. Jack Goldstein and Ms. Elaine Snobar, with respect to the percentage of culture tests performed by Biometric yielding results warranting sensitivity tests, the percentages to which they testified were all based on the results of culture tests generally, as performed by Biometric, without any breakdown with respect to tests on specimens from Medicaid patients, and could manifestly not be regarded as the percentages reflecting Biometric's experience in Medicaid cases.

The Government also relied on computer printout evidence showing a much smaller percentage of sensitivity

tests for which Biometric billed, and was paid by, Medicaid during the period after October 1976, as compared with the prior period. However, there was no basis for any meaningful comparison between the indicated percentage figures for the respective periods. For one thing, the number of culture tests billed to, and paid for by, Medicaid during the later period was itself a great deal smaller than the number of culture tests involved in the earlier period. Thus, the computer printout showed that the total number of cultures billed by Biometric to, and paid for by, Medicaid, for the period from November 1, 1976 through 1977, was only 2,585, as compared with 18,887 culture tests billed and paid in 1975 and 7,472 billed and paid from January to October 1976 (G. Ex.'s 113, 114). Furthermore, the change in the governing regulations, effective November 1, 1976, for the first time specifically excluded any allowance for sensitivity tests in a large class of cases.

3. As to the irrelevant evidence introduced as purported proof of motive.

The question here presented is of general importance in Federal criminal cases, involving as it does the limitations on the admission of prejudicial evidence of other crimes or acts as purported proof of such matters as criminal intent or motive.

As shown above, the trial court here permitted the Government to introduce evidence, over petitioners' objections, on its direct case, with respect to various transactions having no connection with the crimes charged against petitioners, involving, on the one hand, petitioner Vazquez and her personally owned entity, Hispanic, and, on the other hand, several other entities of which petitioner Biometric, or its principal, Halpert, was the sole stockholder. The challenged evidence showed that monies

of Biometric aggregating $11,600, in the form of Biometric Chemical checks, were deposited in Hispanic's bank account; that a total of some $9,900 was then withdrawn from that account, some $4,500 of which was in the form of checks drawn to the order of a Halpert-owned corporation, General Research, and the balance in the form of checks drawn to Vazquez or her children, or to cash, or to miscellaneous persons who apparently endorsed the checks over to Vazquez; that the checks to the order of General Research were deposited in the latter's bank account by Vazquez; and that in the case of a number of such deposits, Vazquez substituted those checks for cash receipts of General Research and, in several of such instances, "whited out" or crossed out the "cash" items on the deposit slips and substituted check items therefor.

The Government contended that the foregoing evidence was relevant as proof of motive on Vazquez's part to commit a fraud on behalf of Biometric, and urged that it was such as to "suggest she was getting extra money out of the corporation or alternatively that she was acting on behalf of the corporation paying kickbacks to Medicaid doctors for the purpose of referring business to Biometric" (82a-83a). Defense counsel objected that the proffered evidence was completely irrelevant and highly prejudicial and productive of nothing more than "speculation and suspicion" (80a-81a, 160a, T. 667-8, 694, 713-14, 717).

The trial court admitted the evidence, holding that it was "probative on the question of motive" as showing the receipt of "compensation" by petitioner Vazquez from "Halpert through his various corporations" (85a, 169a-170a, T. 667-8, 695, 714, 717). The court, however, did not instruct the jury as to the limited purpose of the evidence and instead ruled that "what the jury may make of the evidence, of course, * * * [is] entirely up to the jury"

(170a). Nor did the court indicate that it had weighed the probative value of the evidence against its potentially prejudicial impact (*cf.* Fed. R. Evid. 403).

It is clear that, at most, only a portion of the foregoing evidence was admissible on the issue of motive; namely, that portion showing the deposits made in Hispanic's bank account of checks representing Biometric funds. Those deposits could be regarded in the same light as if the monies had been turned over directly to Vazquez, since Hispanic was, by her admission, her "personal business" and she was the only authorized signatory for withdrawals from its bank account (T. 666, 736-7).

The other evidence with respect to the withdrawals thereafter made by Vazquez from Hispanic's account, particularly the transactions involving the separate entity, General Research, were neither relevant nor of any probative value on the issue of motive and went far beyond the Government's alleged need for proof on that issue, and should, in any event, have been excluded because of its highly prejudicial nature.

Manifestly, Vazquez could in no way be regarded as having derived any personal benefit from drawing checks on the account of her "personal business", Hispanic, to the order of a separate corporation, General Research, of which she was not a principal, and any substitution of such checks for cash of an equal amount derived from General Research could likewise not be regarded as yielding her any benefit. In essence, the only purpose that the evidence of the transactions relating to Vazquez's substitution of the checks for General Research's cash receipts and her "whiting out" or crossing out of the "cash" items on the deposit slips, could serve, was to give rise to a suspicion that there was a siphoning off of cash through circuitous dealings for some improper purpose,

and, as shown above, the prosecutor accentuated the resulting suspicious aura by referring to the evidence as showing a "launder[ing] [of] the money" through Hispanic's bank account.

The Court of Appeals in the present case did not hold that the challenged evidence was not prejudicial. In its opinion, it stated only that the evidence was not shown to be *"unduly* prejudicial" (App. A, *infra,* p. 2a). However, the question whether evidence offered as proof of motive is of an *"unduly"* prejudicial nature arises only if the evidence is relevant and of some probative value on that issue, and the possibility of prejudice requires the court to weight the probative value of the evidence against the extent of the potential prejudice, in accordance with Rule 403 of the Federal Rules of Evidence. On the other hand, where, as here, the evidence "is not relevant", it is unequivocally mandated that the evidence "is not admissible". Fed. R. Evid. 402; *United States* v. *Lord,* 565 F.2d 831, 837 (2d Cir. 1977).

Further, even if the evidence in question could possibly be regarded as of some probative value, the admission thereof was still an abuse of discretion, since its probative value was at most slight and of an equivocal nature and there was no "real necessity" for it (*cf. United States* v. *Gubelman,* 571 F.2d 1252, 1255 [2d Cir. 1978], cert. den. 436 U.S. 948 [1978]; *United States* v. *Byrd,* 352 F.2d 570, 575 [2d Cir. 1965]), and the trial court failed to weigh such probative value against the potential prejudice and did not instruct the jury that the evidence was being received only for a limited purpose. *Cf. United States* v. *Robinson,* 560 F.2d 507, 516 (2d Cir. 1977), cert. den., 435 U.S. 905 (1978); *United States* v. *Dwyer,* 539 F.2d 924, 928 (2d Cir. 1976).

Conclusion

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 17, 1980.

APPENDIX A

Opinion of United States Court of Appeals

(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BIONETRIC AFFILIATED RESEARCH LABORATORIES, Inc. and LINDA VASQUEZ,

Defendants-Appellants.

Docket #80-1177

Before:

Hon. Jon O. Newman, Amalya L. Kearse, *Circuit Judges* and Edward Dumbauld, District Judge*.

Statement made by the court at disposition of appeal in open court.

JUDGE NEWMAN:

Mr. Kargers you perhaps know we follow the practice of dealing with some cases in open court at the end of argument if we believe that no precedential purpose would be served by issuing a written opinion and we are going to do that in this case. We are going to affirm this case in open court on the basis of the briefs and the oral argument.

Briefly our reasons are these:

In this appeal from judgments of conviction in the Southern District of New York of a corporation and an individual employee for violating Sections 18 U.S.C. § 287 and § 1341, the evidence entitled the jury to find, beyond a reasonable doubt, that the corporation and the individual defendant had engaged in a scheme to commit fraud in connection with the processing of laboratory tests for the purpose of obtaining Medicaid funds fraudulently. The appellants mount an attack on the sufficiency of the evidence and we have reviewed the record and we are satisfied that the jury had an abundant basis to conclude that the corporate and the individual defendants both acted knowledgeably, wilfully, deliberately and fraudulently in performing tests that were unnecessary and in billing for tests that were not performed at all. The appellants also mount an attack on certain evidentiary rulings. We find no merit to these including the claim that evidence admitted on the issue of motive was unduly prejudicial. We think those rulings were well within the trial judge's discretion.

Finally, the claim is made that the trial judge erred in his charge in particularly with respect to the § 287 counts in insufficiently charging on the issue of intent to defraud. We think the charge, read in its entirety, was well within the scope of this court's decision in United States v. Precision Medical Laboratories reported at 593 F.2d 434, (2d

Cir., 1978). Even if the words "intent to defraud" need to be said, or the concept of intent to defraud needs to be articulated to a jury, we think the judge's charge on the aspects of knowledge of wilfullness and/or lawfulness were sufficient to convey that concept to the jury and that their verdict reflects their conclusion that the defendants indeed had an intent to defraud. We know that the charge with respect to the § 1341 counts made that point explicit and the jury returned verdicts on the § 1341 counts as well. For these reasons we affirm the judgments of conviction.

Thank you gentlemen.

APPENDIX B

Opinion of United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

against

BIOMETRIC AFFILIATED RESEARCH LABORATORIES, Inc. and LIDIA VAZQUEZ,

Defendants.

79 CR. 735-CSH

HAIGHT, District Judge:

Defendants' motion for a post-conviction judgment of acquittal pursuant to Rule 29(c), F.R.Cr.P. is denied.

Their main contention attacks the sufficiency of the Government's evidence on *scienter*. Viewing the evidence in the light most favorable to the Government, as I must within the context of this motion, it is clear that under *United States v. Precision Medical Laboratories, Inc.*, 593 F.2d 434 (2d Cir. 1978) the motion fails. *Precision* involved a prosecution, as did the case at bar, for violation of 18 U.S.C. §§287 and 1341 in respect of false claims for laboratory services generated by Medicaid. The Second

Circuit held: "The *scienter* requirement in both of these sections is 'knowledge.' " *Id.* at 443. The convictions in *Precision* were affirmed because the trial court charged the jury that "knowledge and intent were essential elements of the crime." *Id.* at 444. In the case at bar, the jury was so charged, and on the evidence was entitled to find that defendant Vazquez and, through her, defendant Biometric knew that false invoices were being submitted: the falsity lying in charges for services that had not in fact been performed.

Defendants' other contentions have no merit, and require no discussion.

The motions are denied.

It is So Ordered.

Dated: New York, New York
April 15, 1980

/s/ CHARLES S. HAIGHT, JR.
United States District Judge

APPENDIX C

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of August one thousand nine hundred and eighty.

Present:

Hon. Jon O. Newman
Hon. Amalya L. Kearse,
Circuit Judges
Hon. Edward Dumbauld,
District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BIOMETRIC AFFILIATED RESEARCH LABORATORIES, Inc., and LIDIA VASQUEZ,

Defendants-Appellants.

80-1177

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

A. DANIEL FUSARO,
Clerk

by Arthur Heller,
Deputy Clerk

N.B. Since this statement does not constitute a formal opinion of this Court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX D

Statutory Provisions Involved

18 U.S.C § 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

31 U.S.C. § 231. Liability of persons making false claims

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any

soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.